No. 83-5165

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

LESTER ZEISLER, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

VERLIN R.F. MEINZ
Assistant Defender
Office of the State Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

OF COUNSEL

QUESTIONS PRESENTED FOR REVIEW

1. Whether a post-fire search is detached from the exigencies underlying the post-fire exception to the warrant requirement of the Fourth and Fourteenth Amendments where the search is made subsequent to a determination that the threat of reignition or destruction of evidence has clearly dissipated even though the exact cause of the fire remains unknown.

2. Whether a state statute -- here Illinois Revised Statutes 1979, Chapter 127½, Section 8 -- can overcome the principles announced by this Court in Michigan v. Tyler, 436 U.S. 499 (1978) and in its administrative-search cases by permitting a state fire marshal, "at all times of day and night" and without regard to any perceptible emergency, to "enter upon and examine any building or premises where any fire has occurred".

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. 1

TABLE OF CONTENTS II

TABLE OF AUTHORITIES. iii

PRAYER. 1

OPINION BELOW 1

JURISDICTION. 2

CONSTITUTIONAL PROVISIONS INVOLVED. 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I.

THE PETITION PROVIDES THIS COURT AN OPPORTUNITY TO ADDRESS A QUESTION WHICH DIVIDES THE FEDERAL AND STATE REVIEWING COURTS: AT WHAT POINT DOES A POST-FIRE SEARCH BECOME SO DETACHED FROM THE EXIGENCIES UNDERLYING THE POST-FIRE EXCEPTION TO THE WARRANT REQUIREMENT THAT ANY FURTHER SEARCH REQUIRES A WARRANT. 6

II.

THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT, IMPROPERLY ELEVATED THE ADMINISTRATIVE DESIRES OF ILLINOIS REVISED STATUES 1981, CHAPTER 127½, SECTION 8, OVER THE PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY ALLOWING A WARRANTLESS POST-FIRE ADMINISTRATIVE SEARCH. 11

CONCLUSION. 14

TABLE OF AUTHORITIES

Page

Cases

Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). 12

Cleaver v. Superior Court of Almeda County, 155 Cal. Rpt. 559, 594 P.2d 984 (1979). 9

Marshall v. Barlow's Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978). 12

Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) 6-8, 10, 13

Patri v. Percy, 530 F. Supp. 591 (S.D. Wisc. 1982). 8

People v. Calhoun, 49 N.Y. 2d 398, 402 N.E.2d 1145 (1980) . 7

People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871 (1981). . 9, 11-12

People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist. 1983) 9

Romano v. Home Ins. Co., 490 F. Supp. 191 (N.D. Ga. 1980) . 8

Satchell v. Cardwell, 653 F. 2d 408 (9th Cir. 1981) 9

See v. Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967). 12

State v. Hansen, 286 N.W. 2d 163 (Ia. 1979) 8, 13

State v. Harris, 629 S.W.2d 122 (Mo. App. 1982) 8

State v. Monosso, 103 Wis. 2d 368, 308 N.W.2d 891 (Ct. App. 1981) 9

United States v. Schira, 586 F. 2d 15 (7th Cir. 1978) . . . 9

Statutes

Ill. Rev. Stat. 1981, ch. 127½, par. 8. . . . . 11, 13

No.

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OCTOBER TERM, 1982

LESTER ZEISLER, Petitioner

-vs-

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PETITION FOR A WRIT OF CERTIORARI

TO THE

APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

The petitioner, Lester Zeisler, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Third Judicial District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 112 Ill. App. 3d 788, 445 N.E.2d 1324. (See Appendix A.)

The order of the Illinois Supreme Court denying Leave to Appeal is not reported; however, a copy of the order is attached hereto. (See Appendix B.)

JURISDICTION

The final order of the Illinois Supreme Court denying review was entered on May 31, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). This petition is filed within 60 days of the order of the Illinois Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment (IV)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Illinois Revised Statutes 1981, Chapter 127½, Section 8.

8. . . . The Office of the State Fire Marshal shall have the authority at all times of day or night in the performance of the duties imposed by the provisions of this Act, to enter upon and examine any building or premises where any fire has occurred and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the Office of the State Fire Marshal may, in its discretion, be private, and persons other than those required to be present by the Divisions of this Act, may be excluded from the place where such investigation is held, and witnesses may be kept separate and apart from each other and not allowed to communicate with each other until they have been examined.

STATEMENT OF THE CASE

On July 13, 1981, an information was filed in the Circuit Court of the Ninth Judicial Circuit, McDonough County, which named the defendant and charged him with attempt murder and aggravated arson, violations of Illinois Revised Statutes 1979, Chapter 38, Sections 8-4(a) and 20-1.1, respectively (C9a-11a).

Among the defendant's pre-trial motions was his motion to suppress the results of the arson investigation conducted by Hollis Miller (C174-175). The motion alleged that Miller had illegally searched defendant's property without a warrant and that he had then secured a search warrant based on the information invalidly obtained during the prior search. This motion came on for hearing on October 23, 1981 (C330-394). At the conclusion of the hearing, the trial court denied the motion and refused to suppress the evidence (C392-393). The trial court found the search reasonable and cited an Illinois statute, presumably Illinois Revised Statutes 1981, Chapter 127½, Section 8, which provided for investigation of fires for cause determination by municipality fire chiefs and the State Fire Marshal.

Evidence adduced by the State at the trial established that on the evening of June 30, 1981, at around 10:30 p.m., Betty Zeisler came into Larry's Longshot tavern in Bushnell and socialized until approximately midnight when the tavern closed (R160-162). Lester Zeisler was not with her at the tavern between 10:30 p.m. and midnight. Around 12:30 a.m., several neighbors observed smoke coming from the second floor of the Zeisler apartment (R166-169). The neighbors called the fire department (R174-176). Although the neighbors knocked loudly on the door to the apartment, no one responded. The neighbors then tried to enter the apartment but found the door locked (R176-77).

The police and fire department arrived shortly thereafter. Earl Niestradt, Fire Chief of Bushnell, testified that when he

arrived at the Zeisler apartment around 12:30 a.m., firemen were already on the scene (R232-233). Niestradt entered the fire-filled apartment and removed the badly burned Betty Zeisler (R234). It took approximately 20 minutes to get the major portion of the fire under control (C338). The firemen then waited until the smoke cleared before fighting the rest of the fire. After extinguishment of the fire, Niestradt examined the premises to determine the cause and origin of the fire. Concluding that he was not able to determine the cause and origin (R365-366), he decided to call the Deputy State Fire Marshal for assistance in the morning (R237).

Fire Chief Niestradt telephoned Lewis Ellis, the Deputy Fire Marshal from Good Hope, at about 6:30 a.m. that morning, July 1, 1981 (C366). Niestradt told him of the Zeisler fire earlier that morning, that he was unable to determine the cause and origin of the fire and that he would like to have some help. Ellis told Niestradt that a fire investigator would arrive to assist with the investigation around noon (C366-368). Niestradt testified that he did not suspect arson at the time he called Ellis (R373).

State Fire Investigator Hollis Miller arrived at Niestradt's office at noon and both left immediately for the fire-destroyed Zeisler residence (C344-345). There they walked around the outside of the premises (C345). Upon Miller's suggestion, they drove 16 miles to the State's Attorney's Office in Macomb, Illinois, to get a search warrant (C345). They were told that no search warrant was needed so they returned to the Zeisler residence in Bushnell (C346). They then entered the premises for the purpose of determining the cause and origin of the fire. Miller took some photographs (C350) and cleared away some debris on the kitchen floor (C370). Miller observed definite pour and burn patterns in the kitchen (R368). In Miller's opinion, these were clear evidence that the fire was incendiary or man-made in origin (R272). Accordingly, Miller believed a search warrant was needed

to search for accelerants, accelerant containers and other evidence of aggravated arson. Both men proceeded to Macomb and obtained a search warrant (R260-261). Upon returning to Bushnell, Miller took more photographs (R262), removed tile in the kitchen and front room (R268) and examined the kitchen area, the furnace, the washer and dryer.

Charles Hoffman, an investigator with the Springfield Fire Department, did not take part in Hollis Miller's investigation of the Zeisler fire but relied exclusively on Miller's photographs to testify that in his opinion the fire resulted from arson.

Mrs. Zeisler informed the jury that she spent the majority of the day of the fire in local bars (R401). She did not remember much about the night of the fire except that she had a fight with her husband (R392-94) and the next thing she could recall was having fire all around her (R395).

The defense countered with a number of witnesses of its own, presenting essentially alibi testimony tending to establish that the defendant was with Peggy Wishon at the Rosenberry trailer at Bardolph during the time of the fire in Bushnell.

After ten (10) hours of deliberation the jurors returned with verdicts finding defendant not guilty of attempt murder but guilty of aggravated arson (C637). The court then sentenced the defendant to a term of 30 years of imprisonment (R677-79; C282-83).

The defendant filed a notice of appeal to the Appellate Court of Illinois, Third Judicial District. In that appeal the defendant alleged, inter alia, that the trial court erred in denying his motion to suppress observations and discoveries made as a result of an improper warrantless search of his property.

The Appellate Court affirmed the defendant's conviction, generally holding Fire Investigator Miller's search to be permissible under the broad guidelines of Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). The Appellate

Court did not refer to People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871 (1981), the leading Illinois authority in the area of warrantless post-fire searches, but rather quoted favorably from the administrative search provisions of Illinois Revised Statutes 1981, Chapter 127½, Section 8, the same statute relied on by the trial court in denying the defendant's original suppression motion. People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist.; modified March 16, 1983)

The defendant filed a petition for leave to appeal to the Illinois Supreme Court of Illinois reiterating his Fourth and Fourteenth Amendment claims. His petition with that court was denied on May 31, 1983. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PROVIDES THIS COURT AN OPPORTUNITY TO ADDRESS A QUESTION WHICH DIVIDES THE FEDERAL AND STATE REVIEWING COURTS: AT WHAT POINT DOES A POST-FIRE SEARCH BECOME SO DETACHED FROM THE EXIGENCIES UNDERLYING THE POST-FIRE EXCEPTION TO THE WARRANT REQUIREMENT THAT ANY FURTHER SEARCH REQUIRES A WARRANT.

This Honorable Court has addressed the issue of the propriety of warrantless searches to determine the cause and origin of a fire, subsequent to its extinguishment. In Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 489 (1978), this Court held that the fact of a fire created an exigency, one which allowed firemen to enter private property without a warrant to combat the blaze. This Court further held that a fireman's duty included determination of the origin of the fire to prevent reignition and preserve evidence from accidental or deliberate destruction. Accordingly, firemen may " . . . remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished (footnote omitted)."

Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486, 499 (1978).

However, the exigency of a fire does not confer limitless authority to make warrantless post-fire searches. This Court, in Michigan v. Tyler, enumerated certain limits beyond which a warrantless post-fire search is clearly unreasonable. Thus, entries "clearly detached from the initial exigency and warrantless entry" require a warrant. Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486, 499 (1978). In Michigan v. Tyler, a warrantless search three weeks subsequent to the initial causal search was found to be "clearly detached from the initial exigency".

In the five years following Michigan v. Tyler, considerable confusion has arisen concerning the reasonableness of a warrantless search conducted within the outer parameters enumerated in Michigan v. Tyler, but not conducted immediately subsequent to the extinguishment of the fire. The confusion surrounds the reasonableness of a warrantless post-fire search where the exigencies that allowed for this exception to the warrant requirement, fear of reignition and destruction of evidence, have abated.

A uniform standard is needed to determine Fourth and Fourteenth Amendment warrantless search violations entitling the defendant to a remedy. Establishment of a uniform standard by this Honorable Court will aid the administration of criminal justice in both the state and federal courts and provide guidance for fire officials in the field.

Even cursory examination of the leading cases exposes the extent of the conflict concerning the reasonableness of a warrantless post-fire search where the underlying exigencies have dissipated. The New York Court of Appeals in People v. Calhoun, 49 N.Y. 2d 398, 402 N.E.2d 1145 (1980), raises causal determination of a fire to the level of exigency. In that case a fire was

extinguished at 8:30 a.m. The firemen, though unable to determine the exact cause of the fire, retired to their station house, apparently satisfied that the property was safe from reignition and that possible evidence was safe from destruction. A fire marshal arrived four hours later to make an expert determination of the cause of the fire. His arrival was not in response to any exigency, but rather was part of the fire marshal's routine duty of investigating all fires of undetermined origin. Yet, the New York Court of Appeals found the fire marshal's warrantless entry acceptable under the language of Michigan v. Tyler, 436 U.S. 499.

Similarly, the District Court for the Northern District of Georgia in Romano v. Home Ins. Co., 490 F. Supp. 191 (N.D. Ga. 1980) completely ignored the question of the continued existence of exigent circumstances and allowed a warrantless investigation of a fire to take place six hours after its extinguishment. The court relied on the temporal proximity of the investigation to the extinguishment without bothering to determine if the exigencies underlying the post-fire search exception to the warrant requirement had dissipated. See also Patri v. Percy, 530 F. Supp. 591 (S.D. Wisc. 1982) (approving warrantless search of out building never subjected to initial fire) and State v. Harris, 629 S.W.2d 122 (Mo. App. 1982) (approving warrantless search by arson squad even though no danger of reignition or destruction of evidence).

The petitioner maintains the more reasoned approach is that once the firemen determine to their satisfaction that no eminent threat of reignition or destruction of evidence exists the exigencies have dissipated and any further intrusion on private property requires a warrant.

The Iowa Supreme Court followed this approach in State v. Hansen, 286 N.W. 2d 163 (Ia. 1979). The Iowa court looked to see if any exigencies existed to justify a fire marshal's warrantless post-fire search. Finding that no exigencies existed -- since

the firemen left the scene apparently secure in the belief that no danger of reignition or destruction of evidence obtained -- the court determined the fire marshal's warrantless investigation of the following day was unreasonable and the evidence he secured properly suppressed.

This same analysis was followed by the Illinois Supreme Court in People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871 (1981). In People v. Holloway, the court held that . . .

> the fire chief and his men simply extinguished the blaze and left the scene, apparently satisfied that no danger to the public lurked in the smoldering remains, and that no exigent circumstances required an immediate investigation. Under these facts, the conclusion is permissible that the State's interest in promptly determining the cause of the fire must yield to the individual's reasonable expectations of privacy in the burned premises. People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871, 876 (1981).

See also Satchell v. Cardwell, 653 F.2d 408 (9th Cir. 1981); United States v. Schire, 586 F.2d 15 (7th Cir. 1978); Cleaver v. Superior Court of Almeda County, 155 Cal. Rpt. 559, 594 P.2d 984 (1979); State v. Monosso, 103 Wis. 2d 368, 308 N.W.2d 891 (Ct. App. 1981).

An irreconcilable conflict has arisen concerning the determination of a "reasonable" warrantless post-fire search. The facts of the case at bar, People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist. 1983), provide an excellent opportunity for this Honorable Court to alleviate this conflict and aid lower courts in focusing on the appropriate test for determining the reasonableness of a warrantless post-fire search.

In People v. Zeisler, both the trial and the appellate court denied petitioner's motion to suppress evidence acquired in a warrantless search eleven hours subsequent to the extinguishment of a fire. Clearly, the exigencies relied on by this Court in creating a post-fire exception to the warrant requirement of the Fourth and Fourteenth Amendments, prevention of reignition or destruction of evidence, had abated. The fire was extinguished

at 2:00 a.m. After a search by Fire Chief Niestradt, the Bushnell Fire Department was satisfied of the remoteness of the possibility of reignition and allowed the tenants of the fire damaged apartment complex to return to their dwellings and renew their slumber (C339). The fire department was equally satisfied that the destruction of evidence was unlikely. Subsequent to Chief Niestradt's search, the fire department simply left the scene of the fire and returned to the fire house (C340-41).

Unlike the firefighters in Michigan v. Tyler, 436 U.S. 999, the Bushnell Fire Department was not prevented by smoke or steam from completing their search. Chief Niestradt made a complete search. Satisfied that the exigencies of the situation had abated, he and his men returned to the station. Even fire investigator Miller, who made the warrantless search petitioner objects to, recognized the absence of any exigencies. Miller arrived on the scene around noon of the following day but did not enter the property until nearly an hour later. He contented himself with examination of the exterior of the fire scene and then drove to the county courthouse to obtain the warrant he believed the situation mandated him to acquire. Miller failed to obtain this warrant but did proceed to make a warrantless search, even though the exigencies of the situation had long since abated.

The actions of investigator Miller exemplify the confusion for both the courts and fire officials in the field regarding the reasonableness determination of a warrantless post-fire search.

This Court stated in Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486, 499 (1978) (fn. 6), that "[i]n determining what constitutes a 'reasonable time to investigate,' appropriate recognition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy." The petitioner invites this Honorable Court to take advantage of the factual

situation of the case at bar to elaborate upon this standard and eliminate the conflict and confusion that has arisen. Where the exigencies underlying the post-fire exception to the warrant requirement have abated any further search of private property should require a warrant. In this manner the individual's expectation of privacy will be protected. Moreover the courts and fire officials in the field will know with certainty when a search warrant is required.

II. THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT, IMPROPERLY ELEVATED THE ADMINISTRATIVE DESIRES OF ILLINOIS REVISED STATUES 1981, CHAPTER 127½, SECTION 8, OVER THE PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY ALLOWING A WARRANTLESS POST-FIRE ADMINISTRATIVE SEARCH CONDUCTED WITHOUT REGARD TO ANY PERCEPTIBLE EMERGENCY.

The lower-court rulings here against the petitioner should be set aside because the trial and appellate court's reliance on Illinois Revised Statutes 1981, Chapter 127½, Paragraph 8, directly conflicts with the requirements of the Fourth and Fourteenth Amendments as interpreted by this Court.

It is apparent from the record that the trial court decided the motion to suppress by reference to Illinois Revised Statutes 1981, Chapter 127½, Paragraph 8, a statute which provides for cause-of-fire determinations in inspections by fire marshals and which gives marshals authority to enter premises in order to make such inspections (C392-93). The Third District Appellate Court in turn approved the trial court's ruling by quoting directly from the statute relied on by the trial court in reaching its decision. Indeed the trial court's distinguishing the case at bar from People v. Holloway, 86 Ill. 2d 78, 426 N.E.2d 871 (1981)

(the leading Illinois case in the area of warrantless post-fire searches) (see petition at p. 9) and the Third District Appellate Court's failing to even mention People v. Holloway emphasize the inappropriate reliance on Illinois Revised Statutes 1981, Chapter 127½, Paragraph 8 to validate Inspector Miller's warrantless search.

The focus of the trial and appellate courts upon the Fire Marshals Act, Illinois Revised Statutes 1981, Chapter 127½, Paragraph 8, elevates administrative desires over Fourth Amendment rights. Both courts approve a search over a Fourth Amendment issue because the search is made pursuant to an administrative statute which purports to authorize it. This is in direct conflict with established case law.

This court held in Marshall v. Barlow's Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), that a non-consensual inspection pursuant to the Occupational Safety and Health Act required a warrant regardless of the language of a pertinent statute. This Court refused to sacrifice a person's Fourth Amendment rights to an administrative desire. See also Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) and See v. Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967) holding that inspections of private premises to enforce fire, health or housing regulations are subject to the strictures of the Fourth Amendment.

In the case at bar Inspector Miller was called in as part of department "procedure" (C366). Inspector Miller's warrantless search was not in response to any exigency but was rather part of an administrative procedure.

As such, his entry onto the petitioner's property is subject to the warrant requirements of the Fourth Amendment. ". . . [E]ntry to fight a fire requires no warrant and . . . once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional

entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches." Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486, 500 (1978). Inspector Miller's search of petitioner's property did not comply with these procedures.

The Iowa Supreme Court dealt with this issue in State v. Hansen, 286 N.W.2d 163 (Ia. 1979). Iowa Code §100.10 (1979) allowed state fire marshals to enter any building without a warrant. The Iowa Supreme Court found this statute did not validate a warrantless search by a fire marshal the day after a fire. The court stated that "a statutory authorization for an administrative search, absent extenuating circumstances, is not a constitutionally adequate substitute for a search warrant issued by a magistrate." State v. Hansen, 286 N.W. 2d at 167.

A magistrate is required to balance the need for a post-fire administrative search against the threat of disruption to the petitioner.

> For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. . . . Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum. Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486, 497 (1978).

The statutory authorization provided by Illinois Revised Statutes 1981, Chapter 127½, Section 8, for a post-fire administrative search is not sufficient to override petitioner's right to receive the benefit of the judicial balancing which the Fourth and Fourteenth Amendments guarantee.

CONCLUSION

The meaning of a "reasonable" warrantless post-fire search needs objective explanation. Petitioner's Fourth Amendment claim should not have been determined by the trial and appellate courts' constitutionally deficient standard, which elevates administrative desires above the strictures of the Fourth Amendment.

Wherefore, Petitioner respectfully requests that a Writ of Certiorari issue to the Appellate Court of Illinois, Third Judicial District.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR PETITIONER

VERLIN R.F. MEINZ
Assistant Defender
Office of the State Appellate Defender
628 Columbus - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

OF COUNSEL

This Petition for Writ of Certiorari was prepared with the assistance of James Weber, a law student at Indiana University, School of Law

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LESTER ZEISLER, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Lester Zeisler, by and through his counsel, Robert Agostinelli, Deputy Director, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Petition for Writ of Certiorari, without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner was previously granted leave to proceed in forma pauperis in this cause both in the Illinois Appellate and Supreme Courts.

The Petitioner's affidavit in support of this Motion is attached hereto.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 26th day
of July, 1983.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

LESTER ZEISLER, PETITIONER

-VS-

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

I, Lester Zeisler, being first duly sworn according to law, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? N

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   N/A

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? N/A

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. no

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned. 100

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

no

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Lester Zeisler Bobby Zeisler
Annette Zeisler Patty Zeisler
Tracy Zeisler Tammy Zeisler

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Further Affiant sayeth not.

Lester Zeisler
LESTER ZEISLER

SUBSCRIBED AND SWORN TO
Before me this 7 day
of June, 1983.

Jerry Bradley
Notary Public

1-31-85

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LESTER ZEISLER, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

CERTIFICATE OF SERVICE

I, Robert Agostinelli, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) That I have served one copy of the Motion for Leave to Proceed in Forma Pauperis, the Affidavit in support thereof, and the Petition for Writ of Certiorari on counsel for Respondent, by depositing same in a United States Post Office mail box at 628 Columbus Street, Ottawa, Illinois 61350, with first class postage prepaid, and with the envelope addressed as follows:

Honorable Neil Hartigan
Attorney General
188 West Randolph - Suite 2200
Chicago, Illinois 60601

(2) The above named party is the only party required to be served.

(3) I further state to the best of my knowledge that the Court's copies of these documents were enclosed in an envelope, properly addressed to the Clerk of this Court, and that said envelope was deposited in a United States Mail Box at 628 Columbus Street, Ottawa,

Illinois 61350, with first class postage prepaid on the 26th day of July, 1983, which is within the permitted time of filing.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 26th day
of July, 1983.

Donna Baur
Notary Public

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LESTER ZEISLER, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

APPEARANCE

The Clerk will please enter my appearance as Counsel for the Petitioner.

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate
Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350

COUNSEL FOR PETITIONER

The Clerk is further requested to notify counsel of action of the Court by means of regular mail.

In this case the person to be notified for Petitioner is

ROBERT AGOSTINELLI
Deputy Director
Office of the State Appellate
Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350

APPENDIX A

STATE OF ILLINOIS

81-750

(Modified Opinion Filed March 16, 1983)

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-two, within and for the Third District of Illinois:

Present-

HONORABLE TOBIAS BARRY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice X

HONORABLE JAY J. ALLOY, Justice X

HONORABLE JAMES D. HEIPLE, Justice X

HONORABLE ALBERT SCOTT, Justice

JOSEPH FENNESSEY, Clerk

BE IT REMEMBERED, that afterwards on February 17, 1983 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz: Modified Opinion Filed March 16, 1983.

No. 81-750

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D., 1982

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McDonough County
Plaintiff-Appellee,	)	
vs.	)	
LESTER ZEISLER,	)	Honorable Charles Wilhelm Judge Presiding
Defendant-Appellant.	)	

Mr. JUSTICE HEIPLE delivered the Opinion of the Court: Publ. in Full

This matter involves a fire at the Zeisler residence which left Betty Zeisler severely burned over three-quarters of her body. As a result, Betty's husband, Lester Zeisler, was charged by information with two offenses: (1) attempt murder (Ill.Rev.Stat. 1979, ch. 38, pars.8-4(a), 9-1(a)(1); and (2) aggravated arson (Ill.Rev.Stat. 1979, ch.38, par.20-1.1). Following a jury trial, Lester Zeisler was acquitted of attempt murder but convicted of aggravated arson. The trial court sentenced him to a term of 30 years of imprisonment. Mr. Zeisler now appeals.

In addition to other pre-trial motions, Zeisler filed a motion to suppress the results of the arson investigation conducted by Deputy Fire Marshal Hollis Miller. The motion alleged that Miller illegally searched Zeisler's property initially without a warrant and that the search warrant he ultimately secured was based on

information obtained during the prior illegal search. After a hearing on the motion, the trial court denied Zeisler's motion and refused to suppress the evidence. The trial court found the search reasonable and cited an Illinois statute which provided for investigation of fires for cause determination by municipality fire chiefs and the State Fire Marshal.

A jury trial was held on October 26 through October 30, 1981. During the first two days, the State put on 18 witnesses.

Evidence adduced by the State at the trial established that on the afternoon and evening of June 30, 1981, Lester Zeisler and his wife, Betty, were patrons of several local taverns. At times they were together, but generally they drank with separate groups of persons at different places. At around 10:30 p.m., Betty Zeisler came into Larry's Longshot tavern in Bushnell and socialized until approximately midnight when the tavern closed. Lester Zeisler was not with her at the tavern between 10:30 p.m. and midnight. In the bartender's opinion, Betty was not intoxicated when she left the tavern alone at midnight. Around 12:30 a.m., several neighbors observed smoke coming from the second floor of the Zeisler apartment. The neighbors called the fire department. Although the neighbors knocked loudly on the door to the apartment, no one responded although they heard a noise like a "thud" from the inside. The neighbors then tried to enter the apartment but found the door locked.

The police and fire department arrived shortly thereafter. Earl Niestradt, fire chief of Bushnell, testified that when he arrived at the Zeisler apartment around 12:30 a.m., firemen were already on the scene. Niestradt entered the fire-filled apartment and removed the badly burned body of Betty Zeisler. It took approximately 20 minutes

to get the major portion of the fire under control. The firemen then waited until the smoke cleared before fighting the rest of the fire. Towards the end of the fire fight, but before the fire was out, Niestradt examined the premises to determine the cause and origin of the fire. After deciding that he was not able to determine the cause and origin, he decided to call the Deputy State Fire Marshal for assistance in the morning.

The police and firemen remained at the Zeisler apartment and, at around 1:45 a.m., Lester Zeisler returned home. A policeman on the scene informed Zeisler that his wife, Betty, had been hurt fairly badly. The policeman reported that Zeisler, who was "cocky and drunk," snickered and said, "Oh, really."

In the interim, Betty Zeisler was taken to the McDonough District Hospital. She arrived in the emergency room around 1:45 a.m. According to the attending physician, Mrs. Zeisler had severe burns over 80 percent of her body and was in great pain and in shock. Emergency procedures were undertaken. Because of her condition, Mrs. Zeisler was transferred to the Springfield Burn Center in Springfield, Illinois.

Fire chief Niestradt telephone Lewis Ellis, the Deputy Fire Marshal from Good Hope at about 6:30 a.m. that morning, July 1, 1981. Niestradt told him of the Zeisler fire earlier that morning, that he was unable to determine the cause and origin of the fire and would like to have some help. Ellis told Niestradt that a fire investigator would arrive to assist with the investigation around noon. Niestradt testified that he did not suspect arson at the time he called Ellis.

State Fire Investigator Hollis Miller arrived at Niestradt's

office at noon and both left immediately for the fire-destroyed Zeisler residence. There they walked around the outside of the premises. Upon Miller's suggestion, they drove 16 miles to the State's Attorney's Office in Macomb, Illinois, to get a search warrant. They were told that no search warrant was needed so they then returned to the Zeisler residence in Bushnell. They then entered the premises for the purpose of determining the cause and origin of the fire. Miller took some photographs and cleared away some debris on the kitchen floor. Miller observed definite pour and burn patterns in the kitchen. In Miller's opinion, these were clear evidence that the fire was incindiary or man-made in origin. They clearly rebuffed any notion that the fire was accidental. Accordingly, Miller believed a search warrant was needed to search for accelerants, accelerant containers and other evidence of aggravated arson. Both men proceeded to Macomb and obtained a search warrant. Upon returning to Bushnell, Miller took more photographs, removed tile in the kitchen and front room, and examined the kitchen area, the furnace, the washer and dryer.

The foregoing testimony from the State's witnesses was adduced on the first two days of trial. On the third day of trial, the court convened at the auditorium of the Memorial Medical Center in Springfield, Illinois, to hear the testimony of Betty Zeisler. At that time she was still a patient at the hospital, recovering from injuries sustained in the fire.

The State had previously filed a motion to take the extraterritorial testimony of Betty Zeisler in Springfield. Mr. Zeisler vigorously objected to the State's motion. A hearing on the motion was held. Betty Zeisler's physician testified that she had been burned over 75 percent of her body, had endured repeated skin grafts

and had 10 digital amputations. In the doctor's opinion, transporting Mrs. Zeisler 85 miles from Springfield to Macomb for the trial would be detrimental to the healing process although it would not be life-threatening. At the conclusion of the testimony and argument of both sides, the trial court granted the State's motion.

Accordingly, the jurors were taken by bus to Springfield to listen to the testimony of Betty Zeisler. The proceedings took place at the Memorial Medical Center in a recreation therapy room measuring 1,000 square feet. An area was specifically set aside in the room for the public and press.

Mrs. Zeisler testified that on the day preceding the fire she and her husband, Lester Zeisler, went to a local gasoline station and purchased some gasoline in a can. Mr. Zeisler wanted the gasoline to mow his mother's yard. Although he did not mow the grass that day, Mrs. Zeisler is unsure what her husband did with the gasoline can. Mrs. Zeisler went to Larry's Longshot tavern that evening from about 10 p.m. to 11:45 p.m. She then walked home and dozed off on the couch in the living room. Lester came home a little later and wanted something to eat. He then picked up a skillet, tried to hit her with it, then threw it on the floor. Zeisler then hit his wife with his fist, knocking her to the floor. The next thing Mrs. Zeisler remembers is having fire all around her. She recalls her body on fire. Her husband Lester stood over her and said, "Burn, bitch, burn." Lester then dragged her into the living room and locked the door as he left the apartment.

On cross-examination, Mrs. Zeisler admitted that she had been in and out of bars during the afternoon preceding the fire on June 30. She had an argument with Lester that afternoon, asked him for a divorce and ran away from him. Mrs. Zeisler was upset with

Lester because of his seeing Peggy Wishon who was the wife of her brother Earl. She did not think that she was drunk when she walked home from the tavern around midnight that night. Peggy Wishon and Peggy's mother, Delores Rosenberry, were with Lester when the fire started in the apartment.

The State rested at the conclusion of Mrs. Zeisler's testimony. The defense countered with a variety of witnesses presenting essentially alibi testimony. Not germane to this appeal, we find further elaboration unnecessary.

Among the motions filed by Zeisler prior to trial was one seeking to suppress the results of the fire investigation conducted by Deputy Fire Marshal Hollis Miller. Zeisler claims that Miller illegally searched his apartment without a warrant and that Miller then searched it again with a warrant secured with information derived from the first search. The trial court denied Zeisler's motion to suppress the evidence from Miller's investigation. Zeisler claims this as error. We do not agree.

Fire officials are charged not only with extinguishing fires, but with finding their causes. According to Illinois law:

> "The chief of the fire department of every city or village in which a fire department is established, *** shall investigate the cause, origin and circumstances of every fire occurring in such city, *** by which property has been destroyed or damaged, and shall especially make investigation as to whether such fire was the result of carelessness or design. Such investigation shall be begun within two days of the occurrence of the fire***." Ill.Rev.Stat.1979, ch.127½, par.6.

The United States Supreme Court has held the contention that the need to obtain a warrant begins with the dousing of the last flame is "unrealistically narrow." (Michigan v. Tyler (1978), 436 U.S.499.)

In Tyler, the court went on to find that the cessation at 4 a.m. of the promptly-begun investigation due to the hindrances caused by darkness and the subsequent continuation of it later in the morning was no more than an "actual continuation" of the first investigation. The court held that the investigation was done in a reasonable time and did not require a warrant.

The instant facts are similar. Fire chief Niestradt began his investigation into the Zeisler fire after the blaze was brought under control. After deciding that he was unable to determine the fire's cause and origin, he decided to call the Deputy Fire Marshal. Niestradt did this promptly at 6:30 a.m. that morning. At that time Niestradt was told a fire inspector would be out to assist him around noon. When Deputy Fire Marshal Miller arrived in Bushnell around noon, Miller and Niestradt entered the apartment to determine the cause and origin of the fire. We do not find this search of the Zeisler apartment so detached from the initial investigation activities of the fire chief so as to require a search warrant. We note that the fire occurred after midnight. The town of Bushnell is small in population with no fire marshal or investigator readily available. We note also that Bushnell fire chief Niestradt was fully employed as manager of a grain elevator. As Bushnell is not a large metropolis, we can assume Niestradt's activities as fire chief are limited. We believe it reasonable that he called in a fire investigation professional with as much dispatch as possible given the circumstances. For Niestradt to suspend his investigation for several hours until the arrival of an expert is like postponing the search until the smoke clears or the proper tools become available. Thus the evidence of arson gathered during the Miller - Niestradt investigation was proper; the evidence

was found during a continuation of the prompt investigation of the cause of the fire.

It is important for us to note at this juncture that it is clear from the record Niestradt did not suspect arson when he called the Deputy Fire Marshal for assistance. Had Niestradt suspected arson and his purpose for visiting the Zeisler apartment with Miller was for gathering evidence of arson, then their conduct might well have exceeded the bounds of the fourth amendment if they did not have a warrant. But such is not the case. It wasn't until Miller came across the pour and burn patterns during his first visit that arson was suspected; a warrant was then immediately sought and obtained.

While search warrants are always preferred, we recognize that practicality demands some flexing. To hold that fire investigators relinquish their authority to search without a warrant for the cause of the fire once they depart from the dwelling for any reason, is impractical and unreasonable. Such is not required by the law. The trial court, after hearing the evidence and argument of counsel, held that the warrantless fire investigation by Miller was reasonable and the evidence of arson therein obtained was admissible. We will not disturb the trial court's ruling on a motion to suppress unless it is manifestly erroneous. (People v. Williams (1974), 57 Ill.2d 239,246.) We cannot say, from the evidence presented, that the trial court's ruling on the motion to suppress was manifestly erroneous.

As his second claim of error, Zeisler contends that the trial court's decision to permit the jurors to witness the testimony of the victim, Mrs. Zeisler, at the hospital was error which requires reversal of his conviction. We do not agree.

The defendant contends that a court is powerless to act in any place other than the courtroom designated by law. In support of this contention, defendant cites two statutes, neither of which apply to this case.

The first statute provides that a criminal action must be tried in the county where the offense was committed. Criminal Code of 1961, section 1-6 (a) (Ill. Rev. Stat. 1979, Ch. 38, Par. 1-6 (a) .) This is a venue statute. No one is asserting that venue has been set in Springfield County rather than McDonough County where the offense occurred. The sole purpose of the trip to Springfield was to allow the jury to hear the testimony of a witness and nothing more. For all other purposes the trial was held in McDonough County.

The second statute provides for the establishment of a temporary courthouse in the event of a national emergency or public calamity. "An Act relating to the Circuit Courts", section 33 (Ill. Rev. Stat. 1979, Ch. 37, Par. 72.34.). This statute obviously contemplates the necessity of re-establishing the situs of a courthouse and has nothing to do with regulating the proceedings within an individual trial.

Defendant also cites two rather old Supreme Court decisions which held that a court can exercise its functions only in the places appointed by law. (People v. McKeeney (1913) 259 Ill. 161; McCune v. Reynolds (1919) 288 Ill. 188.) We feel that these cases are of limited scope today in light of the fact that a court may, in its discretion, permit a jury to view evidence outside of the courtroom. In a similar manner, we do not construe those cases as preventing a judge from exercising his discretion, in limited circumstances, to

permit a jury to hear the testimony of a witness outside of the courtroom. The judge controls the conduct of trial and should be given broad discretion in doing so. (People v. Beil (1979) 76 Ill. App. 3d 924)

In the instant case, the testimony of Mrs. Zeisler was important. She was the victim of the alleged crimes. In the hearing on the motion, her physician testified that it would be quite stressful for her to travel from the hospital to Macomb to testify in the trial. At the time of trial she still had a tube in her neck for breathing purposes. Moreover, the trip would have retarded her tenuous burn healing process.

We are cognizant that the trip would not have threatened the life of Mrs. Zeisler. We are also well aware that the Supreme Court rules provide for introduction into evidence of the deposition of a witness unable to attend a trial. (73 Ill. 2d R. 212, R. 414.) These facts alone, however, do not support the claim that the trial court abused its discretion without some showing that the defendant was prejudiced when the jury was allowed to hear Mrs. Zeisler's testimony outside the courtroom.

The defendant argues that he was prejudiced because taking the testimony of a witness in a hospital somehow denigrates the dignity and decorum of the proceedings and gives undue emphasis to the testimony of that witness. We believe that the court carefully controlled the conduct of the proceedings and established adequate safeguards to prevent any over-emphasis. Upon informing the jury that they would hear testimony at the hospital, the judge made the following statement:

> "You will be accompanied in your transporting by the bailiffs only and, of course, a driver person.

> The . . . We will take testimony, and the place . in which we take it will be a public place and will be used at that place as a court facility very temporarily.
>
> During your travel to and from Springfield, it would be the direction of the Court, and the bailiffs would see to it, that, of course, you not discuss the case, not discuss your reason for going to Springfield, nor discuss the testimony that you hear in Springfield. In other words, you will treat tomorrow as just another day in court for the purpose of considering evidence with respect to this matter.
>
> I would ask and direct that you not take any reading material that would contain any information regarding this trial, and I would further direct that the mere fact that we are not holding court in this room tomorrow should not be considered by you in any way.
>
> You should not be biased or prejudiced against the Defendant or the People. In other words, it should be considered as just another day in Court.
>
> I would estimate that you will be back early in the afternoon, reasonably early in the afternoon. You will be provided with the necessary meals and provisions will be made for public spectators as necessary.
>
> With that I, of course, would admonish you again not to read anything about this case, listen to anything on the radio, talk about it either among yourselves or to members of your family, and with that see you tomorrow. Good night."

It is apparent that the judge was stressing the fact that the proceeding should be considered just another day in court. The testimony was heard in a 1,000 square foot hospital facility which was sufficient to accommodate the persons necessary for the proceeding and the interested public. There is no evidence that dignity and decorum were in any way denigraded by this procedure. The mere fact that the jury knew they were in a hospital, in view of the court's safeguards, does not demonstrate any prejudice to the defendant. (People v. Jenkins (1980), 88 Ill.App.3d 719.)

Under the circumstances of this case, we find that the trial court acted properly in granting the state's motion to hear the testimony of Mrs. Zeisler outside the courtroom. Accordingly, we affirm the judgment.

AFFIRMED.

ALLOY, J., concurs.

STOUDER, J., dissents with opinion

Case No. 81-750

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1983

The PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LESTER ZEISLER, Defendant-Appellant.	)	Appeal from the Circuit Court of McDonough County, Illinois. Honorable Charles Wilhelm Judge Presiding

Mr. JUSTICE STOUDER DISSENT Publ in Full

I respectfully disagree with my colleagues as to the issue of whether it was error to permit the jurors to witness the testimony of the victim at the hospital. I believe that it was reversible error to do so.

The Illinois Supreme Court has stated that courts are not migratory and can only exercise their functions in the places appointed by law, People v. McKeeney (1913), 259 Ill. 161, 102 N.E. 233, and Illinois law clearly contemplates that legal proceedings will be held in county courthouses. Ill. Rev. Stat. 1981, ch. 37, par. 72.33 and par. 72.34.

Furthermore, in McCune v. Renolds (1918), 288 Ill. 188, 123 N.E. 317, a will contest action, the court indicated it was error to allow the removal of the trial court to the home of a witness to the will for the purpose of taking his testimony, he being ill and unable to attend the proceedings. However, because the witness's testimony was not essential in establishing a prima facie case of the lack of testimentary capacity or undue influence and the taking of the testimony at his home was agreed upon by the parties, such error was a harmless one. (see People v. Jenkins (1980), 88 Ill. App.3d 719, 419 N.E.2d 1125 for a contrary view; the court holding that it was not error to remove the trial court to a hospital to hear the victim's testimony, the only error considered being the claim of defense counsel that he was deprived of an opportunity to voir dire the jury on

any bias they might have about removal of the court to a hospital setting.)

The law in this area among the other states does not clearly establish the propriety or impropriety of hearing a witness's testimony outside of a courthouse. Trial - Place of Session, 18 ALR3d 572. However, it appears in most cases holding that no error results, specific mention is made of either an agreement between the parties to hear a witness's testimony outside of the courtroom, the fact that no statute exist which prohibits the holding of court outside of the courthouse or the fact that testimony was heard at a view in order to explain what was being seen by the jurors. Conversely, in those cases holding that error does result in hearing a witness's testimony outside of the courthouse, the decisions appear to be based upon jurisdictional grounds: holding court anywhere other than the legally designated place is not authorized by law and is therefore void.

As stated previously, Illinois statutory law contemplates that legal proceedings will be held in courthouses. Of probably even greater importance as applied to the circumstances of this case, is Supreme Court Rule 414(a) (Ill. Rev. 1981, ch. 110A, par. 414(a)) which provides for evidence depositions of witnesses who may be unavailable to testify in criminal cases. This rule specifically applies to the circumstances of the victim in this case and her apparent inability to testify at the trial. Granted the trial judge has discretion in the conduct of the trial, the discretion is exercisable in the context of guiding principles and rules and is limited by the applicable principles and rules. Neither the trial court nor the majority of this court, suggest any reasons why Supreme Court Rule 414 (a) was inapplicable or in any way suggest how or why the circumstances did not fall within its scope. Where there is as in the present case, a Supreme Court Rule providing for the circumstances which have arisen, I am unable to agree with the majority that the general discretion of the trial court is adequate authority to adopt a contrary procedure. That the result achieved by transporting the jury and other court personnel a substantial distence to a converted hospital auditorium is unusual and prejudicial is recognized by the majority when it emphasizes the "safeguards" which were employed b y the trial court. If this was just an ordinary hundrum

occurence no "safeguards" would have been necessary or even appropriate. All the "safeguards" do is emphasize the artificiality of the circumstances in which the victim's testimony is presented and clothe it with the appearance of special uniqueness or credibility. The subtle influence on a jury can only be speculated upon and consequently the procedure is lacking in fundamental fairness and ought not be approved. I believe that in the case at hand, hearing the victim's testimony outside the courtroom setting in a hospital, over the objection of the defendant, placed undue importance upon such testimony regardless of any admonitions given by the trial court to the contrary.

The view of a scene by the jurors has a purpose which cannot be replicated by mere descriptive testimony, however, no additional purpose is served in hearing testimony of a witness outside the courtroom. In fact, a significant amount of prejudice can be created in the minds of the jurors when a witness's testimony is heard outside the neutral atmosphere of the courtroom.

Therefore, it is my opinion that removing the trial to the hospital in order to hear the testimony of the victim was reversible error and this case should be remanded for a new trial.

STATE OF ILLINOIS,
APPELLATE COURT,
THIRD DISTRICT. } ss.

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 16th day of March in the year of our Lord one thousand nine hundred and eighty three.

Clerk of the Appellate Court

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 31, 1983

State Appellate Defender
Third Judicial District
628 Columbus St., Suite 308
Ottawa, Illinois 61350

No. 58144 - People State of Illinois, respondent, vs. Lester Zeisler, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause. This will further serve as notice that the mandate of this Court will issue to the Clerk of the Appellate Court on June 21, 1983.

Very truly yours,

Julieann Hornyak

Clerk of the Supreme Court

RECEIVED
JUN 2 1983
OFFICE OF THE STATE APPELLATE DEFENDER
OTTAWA, ILLINOIS

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AUG 29 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 29 1983
ALEXANDER L. STEVAS
CLERK

NO. 83-5165

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LESTER ZEISLER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,
Assistant Attorney General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

KENNETH A. FEDINETS,
Assistant Attorney General,

Of Counsel.

9

QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence introduced at petitioner's state court trial was properly seized by fire investigators under this Court's holding in Michigan v. Tyler.

2. Whether the Illinois Appellate Court properly construed Ill. Rev. Stat. 1981, ch. 127 1/2, § 8 in conformity with this Court's holding in Michigan v. Tyler.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:	
I.	
EVIDENCE INTRODUCED AT PETITIONER'S STATE COURT TRIAL WAS PROPERLY SEIZED BY THE FIRE INVESTIGATORS UNDER THIS COURT'S HOLDING IN MICHIGAN V. TYLER	2
II.	
THE ILLINOIS APPELLATE COURT PROPERLY CONSTRUED ILL. REV. STAT. 1981, CH. 127 1/2, § 8, IN CONFORMITY WITH THIS COURT'S HOLDING IN MICHIGAN V. TYLER	5
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Michigan v. Tyler, 436 U.S. 499 (1978).....	passim
People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist. 1983).....	6

NO. 83-5165

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LESTER ZEISLER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Appellate Court, Third District, is reported at People v. Zeisler, 112 Ill. App. 3d 788, 445 N.E.2d 1324 (3d Dist. 1983). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

The opinion of the Illinois appellate court provides a statement of additional facts to supplement the Petitioner's statement. The opinion is included as Appendix A of the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the petition for a writ of certiorari to review the judgment of the Illinois Appellate Court, Third District, insofar as petitioner does not raise questions of constitutional proposition that are worthy of review. In seeking a writ of certiorari in this cause, petitioner advances two reasons in support of issuance of the writ. The first issue involves a question of particular application of well-settled decisional law to the facts of the instant case. The second issue involves an interpretation of an Illinois statute. Respondent maintains further review of this case is unnecessary because the decision below does not depart from established precedent. The court below fully considered and correctly decided the questions presented for review. Respondent further maintains that it would not be prudent for this Court to grant certiorari in that the issues herein center around facts peculiar to the case at bar, and would have limited impact on future litigants.

I.

EVIDENCE INTRODUCED AT PETITIONER'S STATE COURT TRIAL WAS PROPERLY SEIZED BY THE FIRE INVESTIGATORS UNDER THIS COURT'S HOLDING IN MICHIGAN V. TYLER.

In the case at bar, both the trial and the appellate courts denied petitioner's motion to suppress evidence seized in a warrantless search pursuant to a post-fire investigation. Petitioner argues that the courts' interpretation and application of Michigan v. Tyler, 436 U.S. 499 (1978) denied him his fourth and fourteenth amendment rights. Respondent submits that the Illinois courts correctly applied this Court's holding in Michigan v. Tyler.

In Tyler, firemen responded to an alarm shortly before midnight. While dousing the flames, a fire lieutenant observed evidence of arson and called a fire marshal and a police detective. They entered the building at approximately 3:30

a.m., but their investigation was hampered by darkness, steam, and smoke. At 9:00 a.m. that morning, they reentered the building and seized certain evidence. Nearly four weeks after the fire, the detective again reentered the building and took photographs.

Deciding that the exigency resulting from the fire was not necessarily extinguished with the last flame, this Court held that "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." Id. at 510. Thus, while on the premises to fight a fire, firemen may seize evidence of arson that is in plain view and may remain on the scene for a reasonable time after the fire is extinguished in order to investigate its cause. Id. at 509-10. Under certain circumstances, fire investigators may reenter the premises after leaving the fire scene, so long as the reentering takes place within a reasonable investigative period. Id. at 511.

In the instant case, an investigation was promptly begun due to the exigency of determining the fire's origin. Earl Niestradt, fire chief of Bushnell, Illinois, testified that he arrived at the fire at approximately 12:35 a.m. along with fellow fire fighters. (C. 336) It took approximately 15 to 20 minutes to get the major portion of the fire under control. The fire fighters then waited until smoke cleared before fighting the rest of the fire. (C. 338) Towards the end of the fire fight, but before the fire was extinguished, Chief Niestradt examined the premises to determine the cause and origin of the fire. After deciding that he was not able to determine the cause and origin, he decided to call the Deputy State Fire Marshal's Office for assistance and did so promptly at 6:30 a.m. that morning. (C. 365-66) He called Mr. Louis Keith Ellis of Good Hope, Illinois. He was told that an investigator would be able to arrive at his location to make an investigation at around noontime. (C. 366-68) Niestradt testified that he did not suspect arson at the time he called the State Fire Marshal's Office. (C. 373)

Fire Investigator Hollis Miller arrived at Niestradt's office at noon and both left immediately for the fire-destroyed premises. (C. 368) Upon their arrival there, they walked around the outside of the premises and then decided to proceed to the State's Attorney's Office in Macomb, Illinois, to get a search warrant. They arrived in Macomb, which was approximately 16 miles from Bushnell, and entailed a 20 to 25-minute ride, and were told by the State's Attorney's Office that no search warrant was needed, so they then returned to the premises in Bushnell. (C. 369-70, 347-48) They entered the premises for the purpose of determining the cause and origin of the fire (C. 352) and remained for five to ten minutes. (C. 370) Miller, at this time, took some photographs and cleared away some debris on the kitchen floor. (C. 258) Miller again thought a search warrant was needed so both again proceeded to Macomb and obtained a search warrant. Upon returning to Bushnell, they again entered the premises. Miller took more photographs, removed tile in the kitchen and front room, and examined the kitchen area, the furnace, the washer and dryer. (C. 372; R. 261-67) They remained in the premises for approximately one hour. (C. 354)

It is clear that under Michigan v. Tyler, Chief Niestradt properly inspected the premises in the early morning hours in light of the exigency of determining the fire's origin. The subsequent entries of Niestradt and State Fire Investigator Miller later that same day were not "clearly detached" from the initial entry but rather were no more than an "actual continuation" of it and within a reasonable time under the circumstances. When Chief Niestradt made an initial and prompt examination of the premises and determined that he did not have sufficient expertise to determine the cause and origin of the fire, he made what the trial court correctly found to be prompt arrangements for assistance. This finding cannot be said to have been manifestly erroneous. Chief Niestradt called the Deputy State Fire Marshal's Office, which

was in a different locale, early the same morning. A state fire investigator arrived only a few hours later at noontime. This continuation of the investigation of the fire was done within a reasonable time and its purpose was not to make a separate search for evidence of crime, but was a continuation of the search to determine the cause and origin of the fire.

Finally, petitioner argues that certiorari should be granted in order for this Court to formulate a rule of law that "once the firemen determine to their satisfaction that no eminent threat of reignition or destruction of evidence exists the exigencies have dissipated and any further intrusion on private property requires a warrant." (Petition for a Writ of Certiorari at 8) This Court in Michigan v. Tyler has explicitly rejected such standard. This Court interpreted the Michigan Supreme Court as stating that "the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame." Id. at 510. This Court then stated that this interpretation was "unrealistically narrow." Id. Justice Stewart extended the exigency exception, holding that officials need no warrant to remain in a building for a "reasonable time to investigate the cause of a blaze after it has been extinguished." Id. at 510.

In the instant case, the return of the fire chief and a state fire investigator to the scene occurred within a reasonable time to investigate and was an actual continuation of the first entry. The appellate court correctly considered the issue as a question of fact to be considered on a case by case basis.

II.

THE ILLINOIS APPELLATE COURT PROPERLY CONSTRUED ILL. REV. STAT. 1981, CH. 127 1/2, § 8, IN CONFORMITY WITH THIS COURT'S HOLDING IN MICHIGAN V. TYLER.

Petitioner advances a second ground in support of his petition for a writ of certiorari: "The lower court rulings here against the petitioner should be set aside because the trial and appellate courts' reliance on Illinois Revised

Statutes 1981, Chapter 127 1/2, Paragraph 8, directly conflicts with the requirements of the Fourth and Fourteenth Amendments as interpreted by this Court." (Petition For A Writ of Certiorari at 11) Respondent maintains that the basis of the appellate court's decision was not its reliance on the above statute, but rather its application of Michigan v. Tyler to the facts in the case at bar. The court cited the statute as the basis of fire officials' authority to investigate the cause and origin of fires. People v. Zeisler, 112 Ill. App. 3d 788, 793, 445 N.E.2d 1324, 1327 (3d Dist. 1983). Then the appellate court went on to consider the officials' actions in light of Michigan v. Tyler. Where a decision of this Court directly controls this case and the application of recent decisional law would result in affirming the decision below, no purpose would be served by granting review in the case at bar.

C O N C L U S I O N

In view of the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,
Assistant Attorney General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

KENNETH A. FEDINETS,
Assistant Attorney General,

Of Counsel.